

Section 4(f) Training

May 2005



Presented by:

Sharon P. Love, P.E.
Environmental Program Manager
FHWA Washington Division



Today's Agenda

- ❖ Context for the Section 4(f) process
- ❖ Basics of Section 4(f)
- ❖ Section 4(f) resources / properties and applicability criteria
- ❖ Use and impact (use vs. impact)
- ❖ Examples of 4(f)resource applicability
- ❖ Feasible and prudent avoidance
- ❖ Minimization of harm and mitigation
- ❖ Evaluation and documentation



Section 303 Title 49

The secretary may approve projects requiring the use of publicly owned land of a public park, recreation area, or wildlife/waterfowl refuge, or land of a historic site of national, state, or local significance (as determined by the officials with jurisdiction) only if-

- 1) There is no feasible and prudent alternative to such use, and**
- 2) The project includes all possible planning to minimize harm**



Context

- ❖ Which came first ...
... NEPA or Section 4(f)?
- ❖ Are you familiar with the FHWA/FTA transportation decisionmaking process?
- ❖ Have you heard of the umbrella approach to environmental compliance?



Section 4(f) Background

- ❖ From a proposed highway project impacts to Brackenridge Park in San Antonio, TX
- ❖ Provision of the DOT Act of 1966
- ❖ Feasible and prudent standard defined by the Overton Park court decision
- ❖ Implementation influenced by court decisions



Section 4(f) Basics

- ❖ Actions of US DOT Agencies - **ONLY**
- ❖ US DOT the resource / regulatory authority
- ❖ Requirements include:
 - Alternatives analysis
 - Avoidance, minimization, and compensation
 - Coordination and consultation
 - Documentation and process
 - Findings
- ❖ Procedural or substantive law?



Section 4(f) References

❖ Legislation

- 49 USC 303 (transportation)
- 23 USC 138 (highways)

❖ Regulation

- 23 CFR 771.135 (FHWA and FTA)

❖ Guidance

- FHWA Policy Paper
- Re:NEPA Community of Practice
(<http://nepa.fhwa.dot.gov>)
- www.environment.fhwa.dot.gov



Section 4(f) Web References

- ❖ CD and website (www.section4f.com)
- ❖ FHWA HQ Section 4(f) Guidance Website
<http://environment.fhwa.dot.gov/projdev/PDsec4f.htm>
- ❖ Section 4(f) Policy Paper (revised in March 2005)
<http://environment.fhwa.dot.gov/projdev/4fpolicy.htm>
- ❖ Programmatic 4(f) Evaluations
<http://environment.fhwa.dot.gov/projdev/4fnspeval.htm>



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Section 4(f) Essentials

- ❖ Properties / resources ...
 - ... parks, recreation areas, wildlife and waterfowl refuges, and historic properties with qualities that satisfy specific criteria
- ❖ Not all parks, recreation areas, wildlife and waterfowl refuges, or historic properties are section 4(f) resources



Section 4(f) Essentials

- ❖ Use – incorporation of land
 - impacts do not always equate to use
- ❖ Section 4(f) standard (approval criteria)
 - no feasible and prudent avoidance alternatives
 - all possible planning to minimize harm
- ❖ Evaluation, coordination, documentation, review requirements, and findings



4(f) Applicability Criteria

- ❖ Parks and recreation areas
 - Publicly owned
 - Public park
 - Major purpose for park or recreation
 - Significant resource



4(f) Applicability Criteria

- ❖ Wildlife and waterfowl refuges
 - Publicly owned
 - Major purpose for refuge purposes
 - Significant property
- ❖ Historic property
 - On or eligible for National Register of Historic Places



Public Ownership

- ❖ Parks, recreation areas, and wildlife and waterfowl refuges
 - Fee simple ownership
 - Permanent easement
 - Temporary easement
 - Lease agreement
- ❖ Not a criteria for historic properties



Public Park

- ❖ Access to the resource
 - Entire public permitted access to park or recreation area (during normal operating hours)
 - Visitation is not limited to a select group(s)
- ❖ Not an absolute criteria for refuges



Major Purpose

- ❖ Primary function of the property ...
... is for park, recreation, or refuge purposes or activities
- ❖ Activities are other than ...
... incidental, secondary, occasional, or dispersed



4(f) Significance

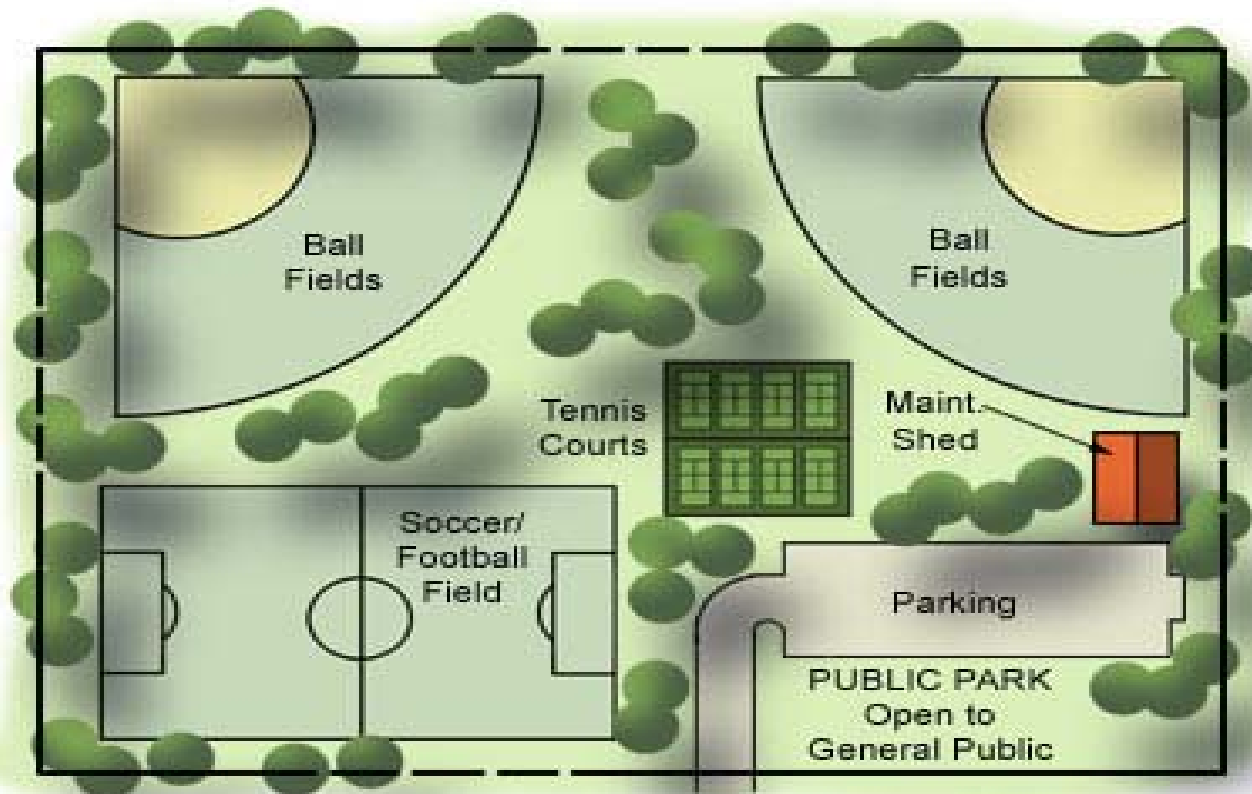
- ❖ Parks, recreation areas, wildlife and waterfowl refuges
 - Considers the availability and function of the resource in terms of the objectives of the agency with jurisdiction
 - The property/resource plays an important role in meeting those objectives



4(f) Significance continued

- ❖ Parks, recreation areas, wildlife and waterfowl refuges
 - Determined by the officials with jurisdiction
 - Presumed significant in the absence of a determination
 - Subject to review by FHWA for reasonableness
 - **Applies to the entire property**

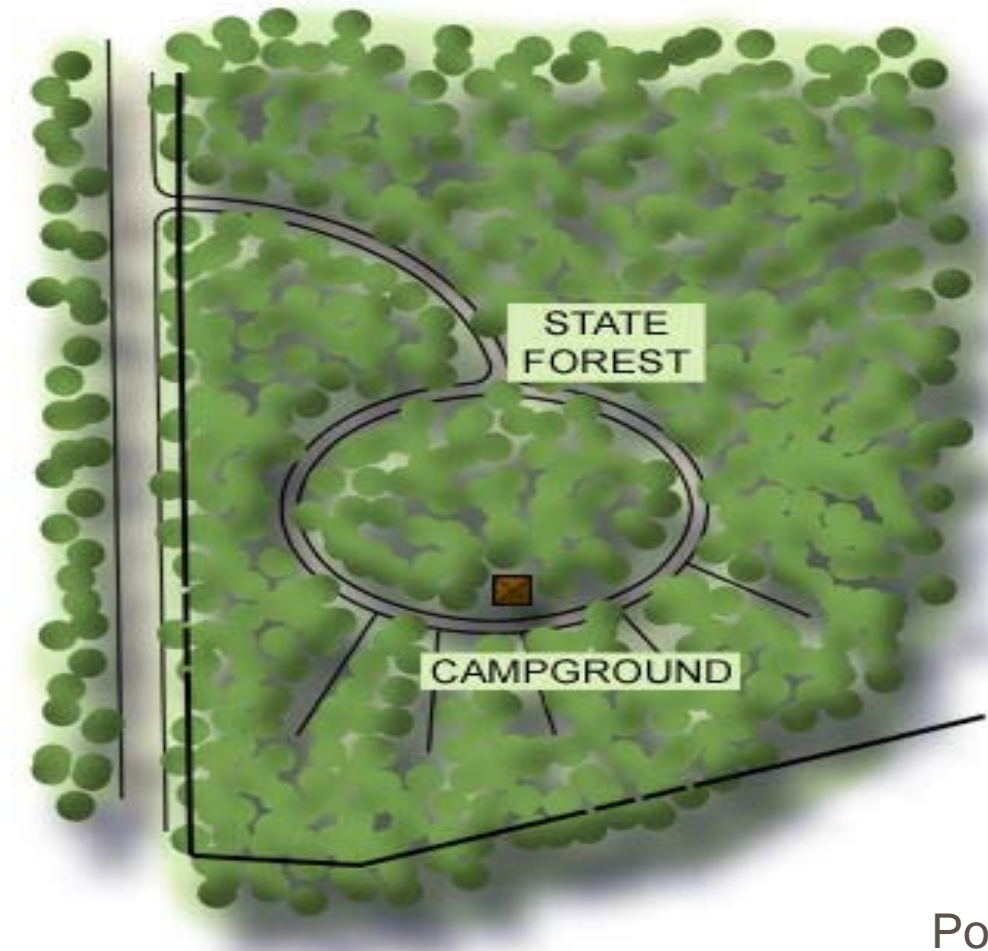
4(f) Significance



A typical recreational resource — a public park open to the public where the main purpose is recreation. The entire park — including parking, maintenance facilities and recreational facilities — must be considered as part of this significant Section 4(f) resource.

* Be aware of two exceptions to this general rule

Public Multiple-Use Lands



Policy Paper Q. 6



4(f) Historic Property

- ❖ Individual historic property
 - on or eligible for the National Register of Historic Places
- ❖ Archeological sites
 - National Register eligible and important for preservation in place
 - not significant for data recovery (information) only



Section 4(f) Applicability

- ❖ In historic districts, property that is
 - individually historic, integral to, or contributing element of the district
- ❖ Locally historic property
 - If determined by FHWA with appropriate and sufficient evidence
- ❖ National Historic Landmarks
 - treated the same way other historic properties are treated, but FHWA should consider their importance and significance.
- ❖ Traditional culture properties
 - on or eligible for the National Register
- ❖ Consultation with SHPO/THPO



4(f) and 106 Relationship

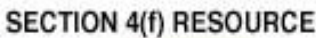
- ❖ National Register eligibility necessary for 4(f) applicability of historic properties
- ❖ Adverse effect does not equal use
- ❖ Use is possible without adverse effect determination
- ❖ Section 106 MOA provides documentation of minimization of harm and of mitigation



Use

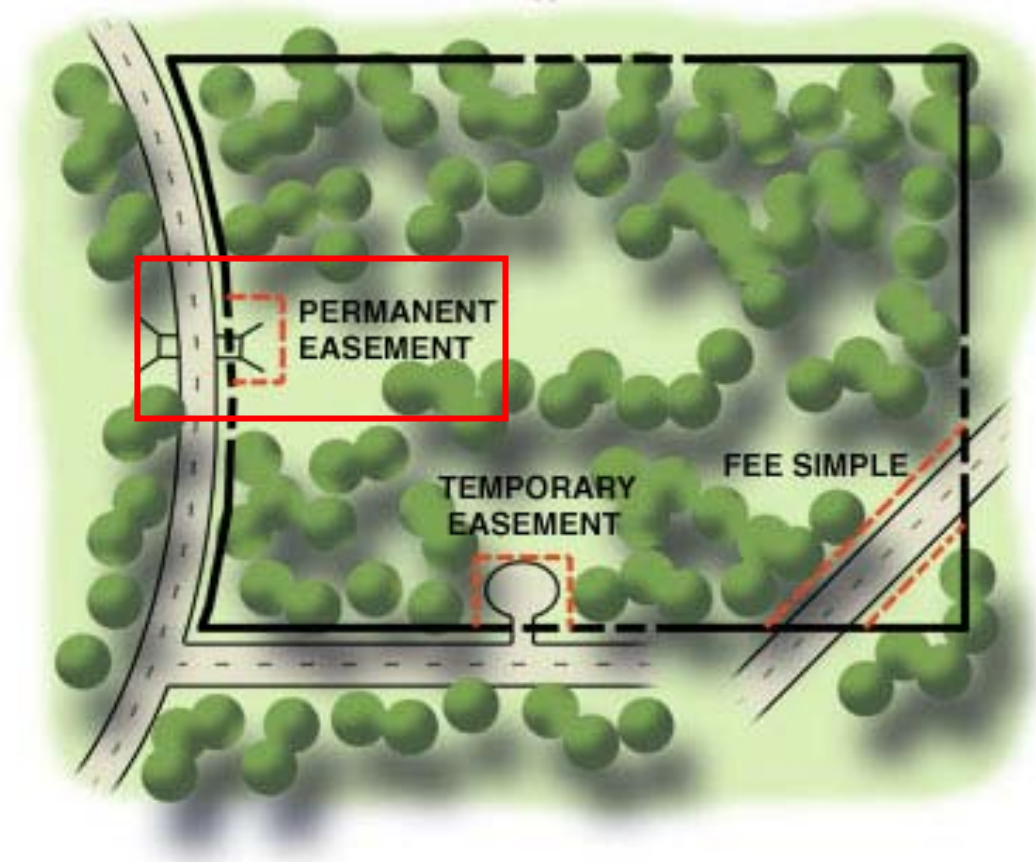
- ❖ Fee simple
- ❖ Permanent easement
- ❖ Temporary occupancy (in some cases)
- ❖ Constructive use

- ❖ Acquisition of property for transportation purposes
- ❖ Conversion to highway or transit ROW (or other DOT need)



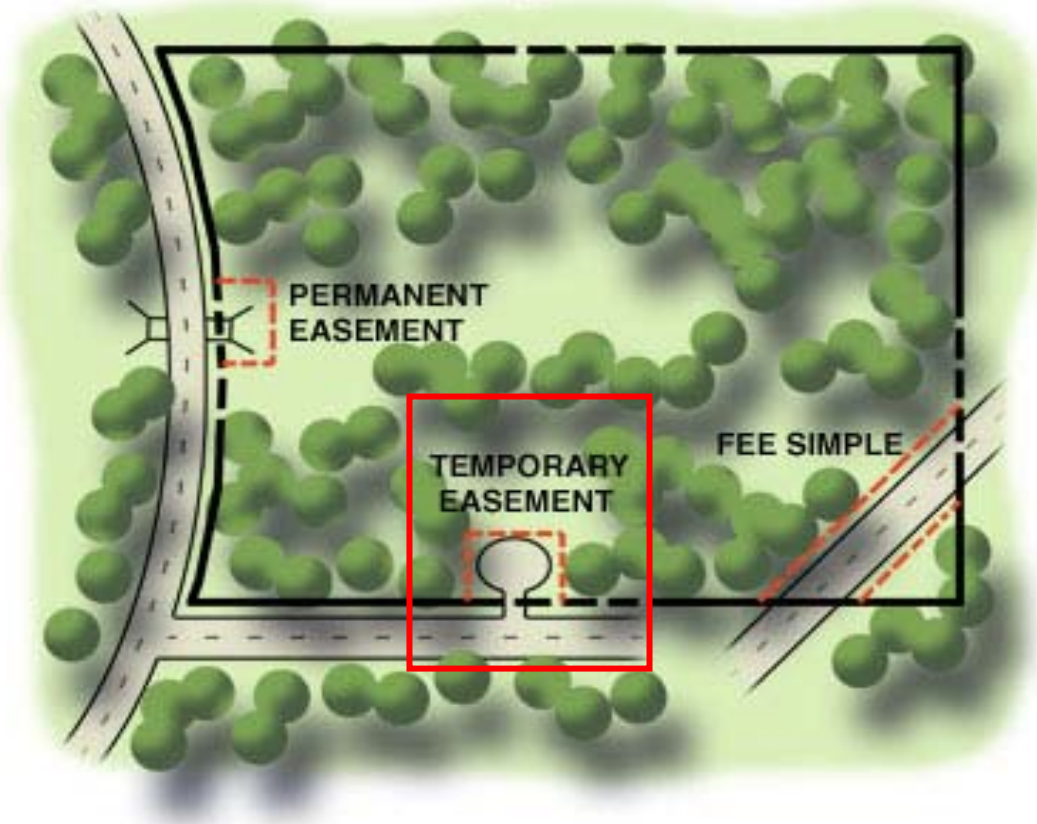
Permanent Easement

SECTION 4(f) RESOURCE



Temporary Easement

SECTION 4(f) RESOURCE



23 CFR 771.135(p)(1) & (p)(7)
Policy Paper Qs. - 1A & 1C



Temporary Easement

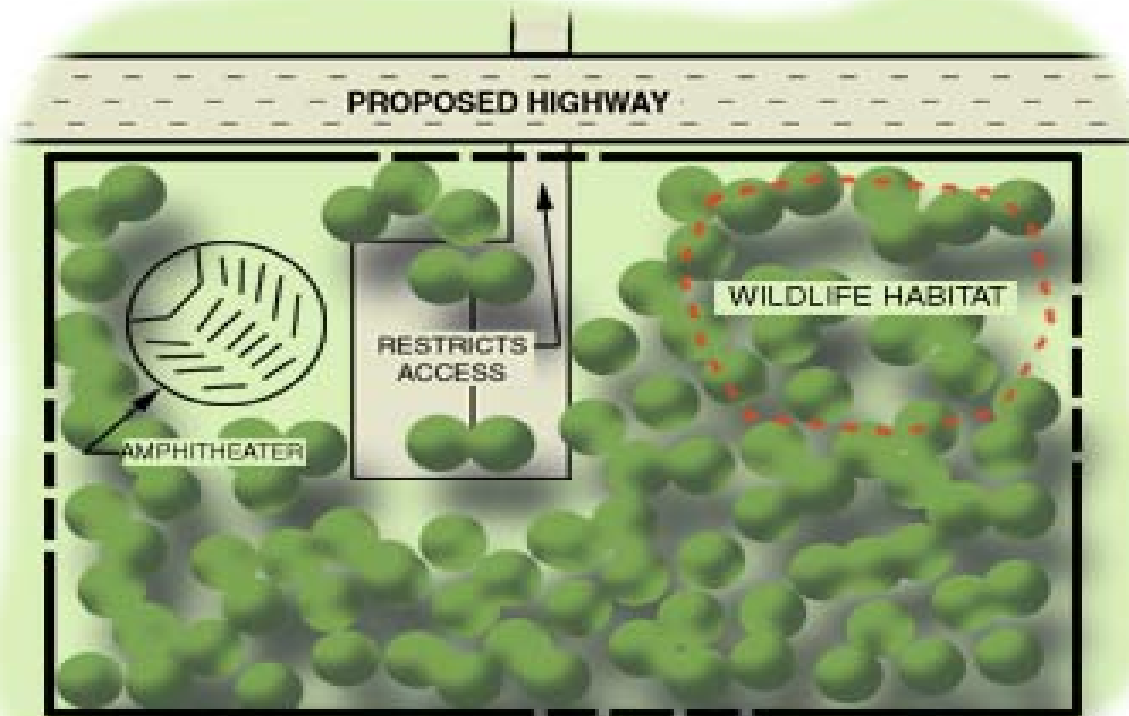
- ❖ Does Not constitute use when:
 - Occupancy is of short duration
... less than project construction
 - No change in ownership
 - No long-term or indefinite interests created
 - No temporary or permanent adverse change
 - Involves only a minor amount of land



Constructive Use

- ❖ No actual incorporation of land
- ❖ Proximity impacts of the project
- ❖ Use defined by **substantial impairment**
 - ... Activities, features, or attributes that qualify the resource for section 4(f) protection are **substantially diminished**

Constructive Use



23 CFR 771.135(p)(2)



Constructive Use

- ❖ Potential constructive use impacts
 - Noise impacts
 - Visual impacts
 - Access restrictions
 - Vibration
 - Ecological intrusion



No Constructive Use

- ❖ No historic properties affected / no adverse effect
- ❖ Noise abatement criteria not approached ...
- ❖ Timing of determination
- ❖ Concurrent development in area
- ❖ Combined impacts not substantially impair
- ❖ Impacts mitigated
- ❖ Minor changes in accessibility
- ❖ Vibration impacts are minor or mitigated

Section 4(f) Examples



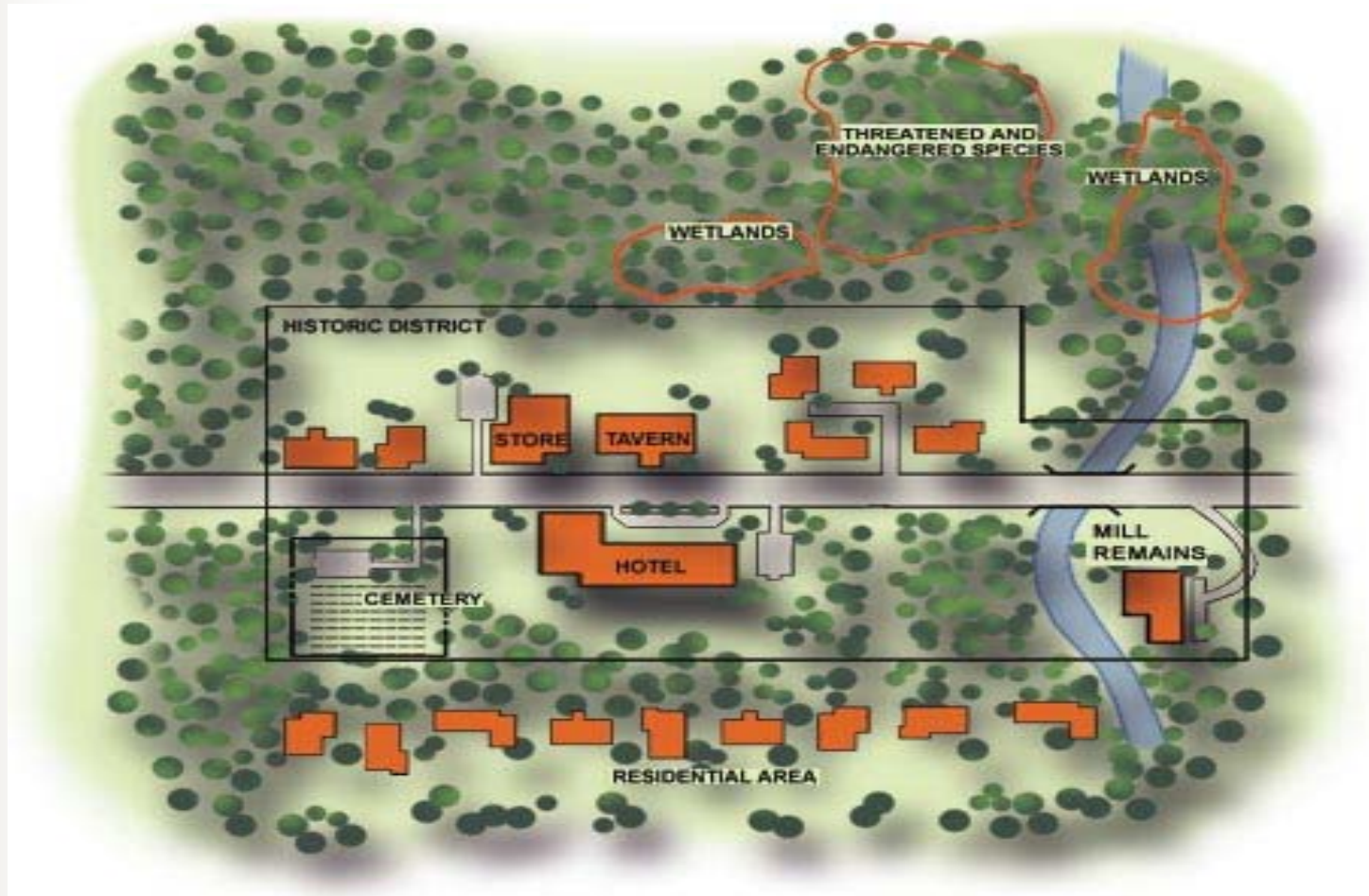
Common situations and resources ...
... FHWA's Section 4(f) Policy Paper



Historic Bridges and Highways

- ❖ Rehabilitation, repair, or improvement
 - No adverse effect - no 4(f) use
 - Adverse effect - 4(f) use
- ❖ Bridge donations (new alignment)
 - Historic integrity maintained - no 4(f) use
 - Historic integrity not maintained - 4(f) use
- ❖ Demolish bridge - 4(f) use

Historic Districts

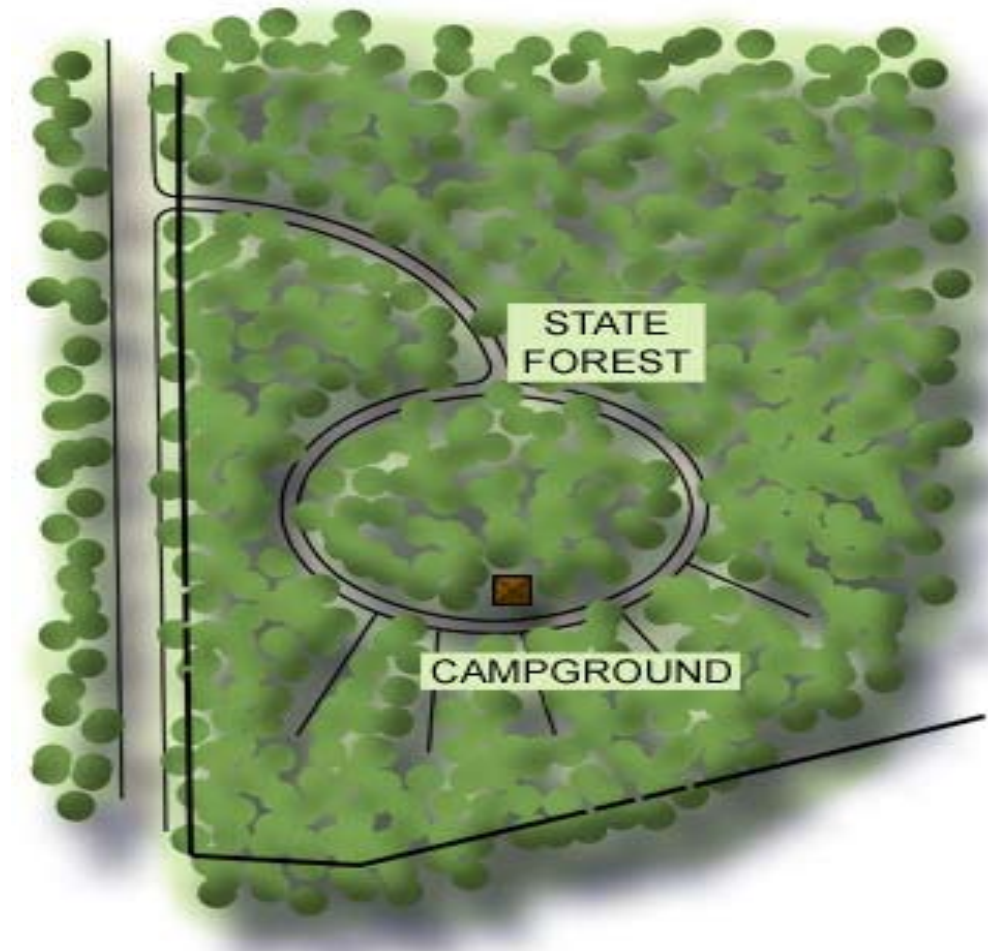




Public Multiple-Use Lands

- ❖ National Forests
- ❖ State Forests
- ❖ BLM lands
- ❖ Public schools
- ❖ Wildlife, game and conservation areas

Public Multiple-Use Lands





Public Multiple-Use Lands

- ❖ 4(f) applies to historic properties
- ❖ Designated / included in management plan
 - 4(f) applies to park, recreation, or refuge activities
 - 4(f) does not apply to areas of non-4(f) function
- ❖ No management plan
 - 4(f) applies where primary function is for park, recreation, or refuge activity
 - No 4(f) where primary function is for other activities



Bodies Of Water

- ❖ How does a highway project use a river or lake? What about ownership? Purpose?
- ❖ May require application of multiple use / primary function concept
- ❖ Rivers are generally not 4(f) except for:
 - Publicly owned recreational trails
 - Designated National Wild and Scenic Rivers



Wild And Scenic Rivers

- ❖ Rivers under study - 4(f) does not apply
- ❖ Designated Rivers
 - Publicly owned - 4(f) applies
- ❖ Publicly owned land
 - 4(f) applies to recreation areas
 - Designated in plan
 - Actually in place (undesigned or no management plan)



Public School Playgrounds

- ❖ 4(f) does not apply where:
 - Primary function for students PE and recess
 - Serves only school activities
 - No or little walk-on activity
- ❖ 4(f) applies where:
 - Significant organized recreational activities
 - Significant substantial walk-on activities



Golf Courses

- ❖ Applicability of Section 4(f):
 - Publicly owned
 - Open to the general public
 - Determined to be a significant recreational area.



Trails & Bikeways

- ❖ Recreational trails
 - Publicly owned - 4(f)
 - Privately owned - no 4(f)
- ❖ Bikeways - primary function
 - Transportation - no 4(f)
 - Recreation - 4(f)
- ❖ Historic trails identified in PL. 95-625 are exempt from 4(f)
- ❖ If a trail is simply described as being in the ROW, then relocation of it within the ROW is not a 4(f) use.



Late Designation

- ❖ If land is acquired for transportation purpose prior to 4(f) designation or prior to change in significance and
- ❖ If adequate efforts were made to identify 4(f) property (requirements and standards that existed at time of study and analysis)



“Planned” 4(f) Facilities

- ❖ Formally designated
and
- ❖ Determined to be significant ...
... for park, recreation, or refuge
purposes

Joint Development



Under joint development, the recreational resource maintains use of the facility for recreational purpose, including the portion reserved for some future transportation use. It is understood by the official with jurisdiction and the state transportation agency that the use of land may not be needed for years and until that time the land can be used for recreational or other purposes.

Joint Development



The lined area shows a boundary of reserved land for future transportation use that an official with jurisdiction and state transportation agency would agree upon in the initial development of the recreational resource.



Occupancy of ROW

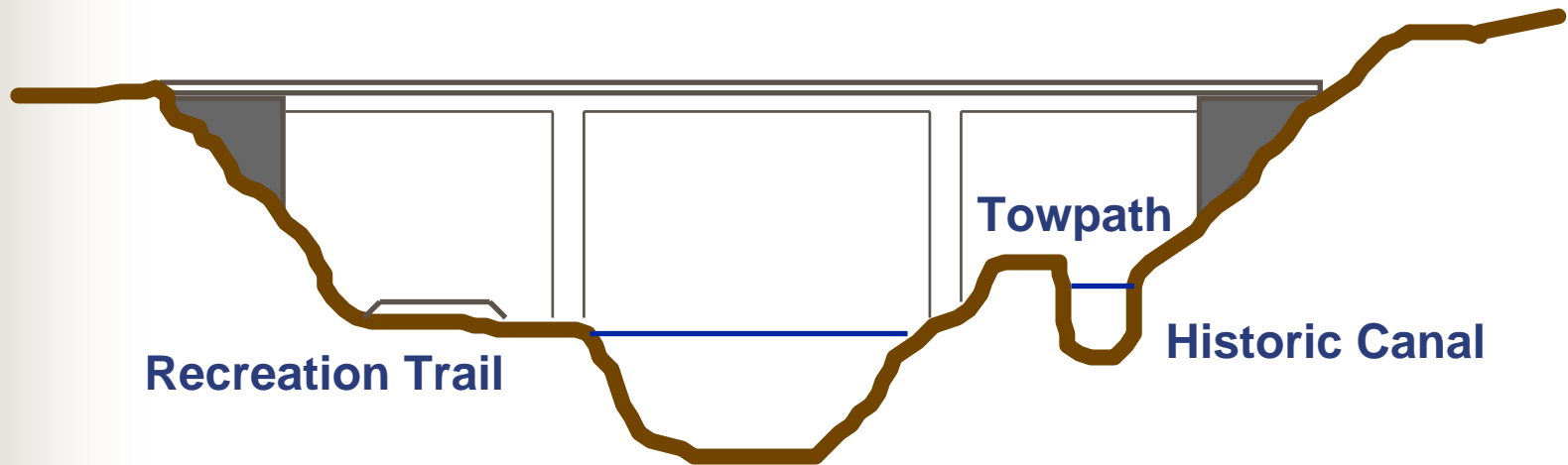
- ❖ Where undeveloped, vacant highway ROW, or preserved transportation corridor is used for other than transportation purposes
- ❖ Section 4(f) does not apply to either authorized or unauthorized occupancy of highway rights-of-way



Wildlife Areas

- ❖ National wildlife refuges - 4(f) applies
- ❖ Wildlife management area -
 - 4(f) applies if primary function is for refuge purposes
 - Otherwise, apply multiple use concept

Air Rights - Bridging





Trans. Enhancement Projects

1. Pedestrian and bicycle facilities
2. Pedestrian and bicycle safety and education activities
3. Acquisition of scenic or historic easements and sites
4. Scenic or historic highway programs, including tourist and welcome centers
5. Landscaping and scenic beautification
6. Historic preservation



Trans. Enhancement Projects

7. Rehabilitation and operation of historic transportation buildings, structures or facilities
8. Conversion of abandoned railway corridors to trails
9. Control and removal of outdoor advertising
10. Archeological planning and research
11. Environmental mitigation of runoff pollution, and provision of wildlife connectivity
12. Establishment of transportation museums



Transportation Enhancement Activities and Section 4(f)

❖ Examples

- A new bike trail in a park – Section 4(f) applies since it involves ‘permanent incorporation of 4(f) land into a transportation facility’.
- Restoration/improvement of a recreational facility or historical site – Section 4(f) does not apply.



Museums, Aquariums, and Zoos

- ❖ Publicly owned museums or aquariums
 - not subject to Section 4(f) unless they are significant historic properties.
- ❖ Publicly owned zoos
 - evaluated on a case-by-case basis



Tribal Lands and Indian Reservations

- ❖ Federally recognized Indian Tribes are sovereign nations, therefore, they are not “publicly owned”, nor open to the general public, and Section 4(f) does not automatically apply.
- ❖ If land owned by a Tribal Government or on Indian Reservation functions as a significant park, recreational area (which are open to the general public), a wildlife and waterfowl refuge, or is eligible for the National Register of Historic Places, Section 4(f) would apply.



Traditional Cultural Properties

- ❖ Must be eligible for the National Register of Historic Places
- ❖ THPO or tribal cultural resources staff should be consulted if the TCP is tribal.



Cemeteries

- ❖ Not 4(f) resources unless eligible for the National Register of Historic Places
- ❖ If human remains are found in an archaeological site, need to consider if the site warrants preservation in place.



Section 4(f) in Tiered NEPA Documents

- ❖ Completion of tier 1 does not relieve FHWA of the responsibility to study an avoidance alternative in tier 2.



LWCFA Section 6(f)

- ❖ Land and Water Conservation Fund Act
 - Coordination and approval of NPS, DOI required
 - Replacement of property (NPS discretion)
 - Applies to locations where LWCFA funds were actually used, if determinable
 - Consult with LWCFA liaison – In Washington State this is the Interagency Committee for Outdoor Recreation

Break Time!



Evaluation and Documentation



FHWA Technical Advisory
T6640.8a



General Documentation Needs

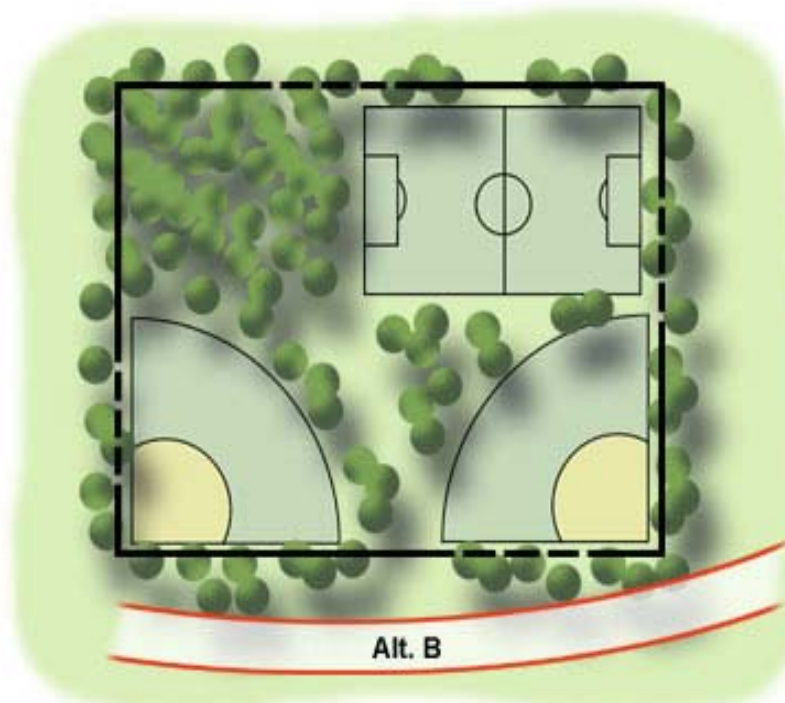
- ❖ Resource applicability or non-applicability
 - public ownership, significance, major purpose
 - eligibility for the NR (historic properties)
- ❖ Avoidance alternatives
- ❖ Coordination
- ❖ Measures to minimize harm
- ❖ Mitigation
- ❖ Finding of no feasible and prudent and feasible avoidance alternatives and ...



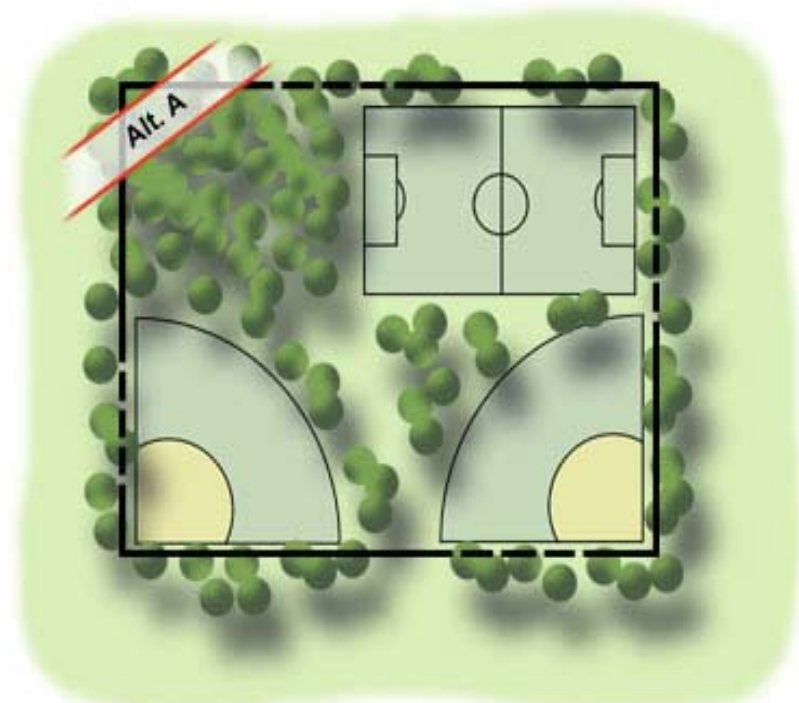
4(f) Evaluation / Documentation

- ❖ Project purpose and need
- ❖ 4(f) resources and properties (applicability)
- ❖ Use and impacts
- ❖ Alternatives considered, including **avoidance** and **minimization**
- ❖ Measures to minimize harm and mitigation
- ❖ Coordination - significance, impacts, mitigation, land conversions
- ❖ Finding of no feasible and prudent alternative

Avoidance and Minimization



Alternative B completely avoids the park and, therefore, may be considered an avoidance alternative. Impacts to additional resources, other than Section 4(f), must be considered in order to determine if the avoidance alternative is prudent.



Even though Alternative A does not impact any recreational elements, it is still considered a minimization alternative. Avoidance alternatives cannot impact any portion of the Section 4(f) resource.



Feasible / Prudent Avoidance

- ❖ Feasible – technically possible, constructible
- ❖ Prudent – reasonable, “does it makes sense?”
- ❖ Make the case:
 - alternative does not meet project purpose and need
 - excessive cost of construction
 - serious operational or safety problems
 - unacceptable social, economic and/or environmental impacts
 - excessive community disruption
 - combinations of the above

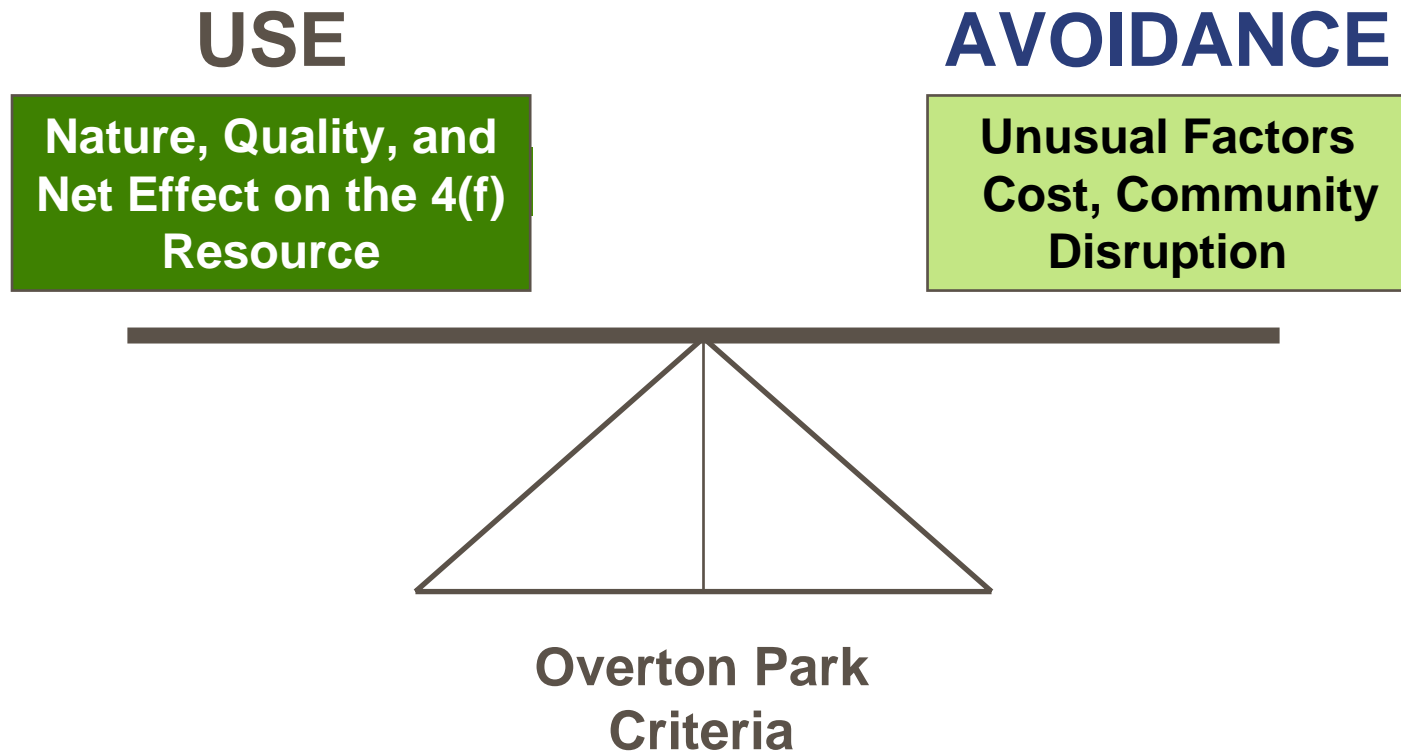


Feasible and Prudent

Overton Park Decision

- ❖ Feasible and prudent alternatives do not create truly unique problems
- ❖ Truly Unique Factors:
 - cost of extraordinary magnitude
 - community disruption of extraordinary magnitude

Feasible and Prudent Analysis (Balancing)

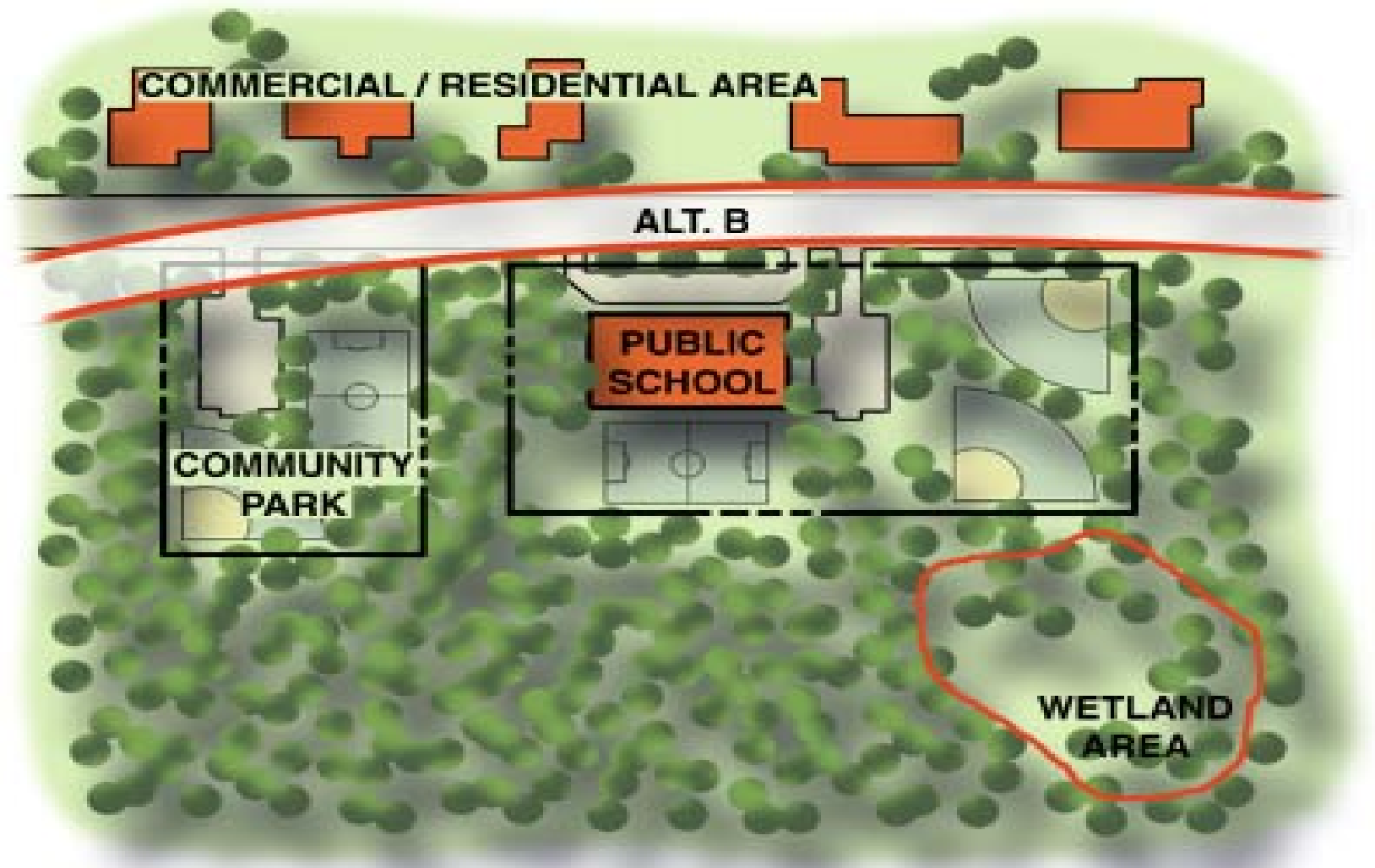




Determining whether an avoidance alternative is feasible and prudent is not easy and at times involves detailed analysis of all of the resources affected by a proposed highway and NOT just the Section 4(f) resource.



This alternative proposes to impact several residences and commercial businesses as part of an effort to avoid Section 4(f) resources. Is this a viable avoidance alternative? To answer this, several factors must be considered, including the socioeconomic impacts to those resources and the surrounding community. This information is compared to other avoidance alternatives to determine Alternative A's viability.



The alignment for Alternative B is successful in avoiding the commercial and residential area; however, it impacts the community park and public school instead. Consequently, Alternative B is no longer an avoidance alternative. (Note that while this public school happens to be a Section 4(f) resource, not all public schools are, necessarily.)



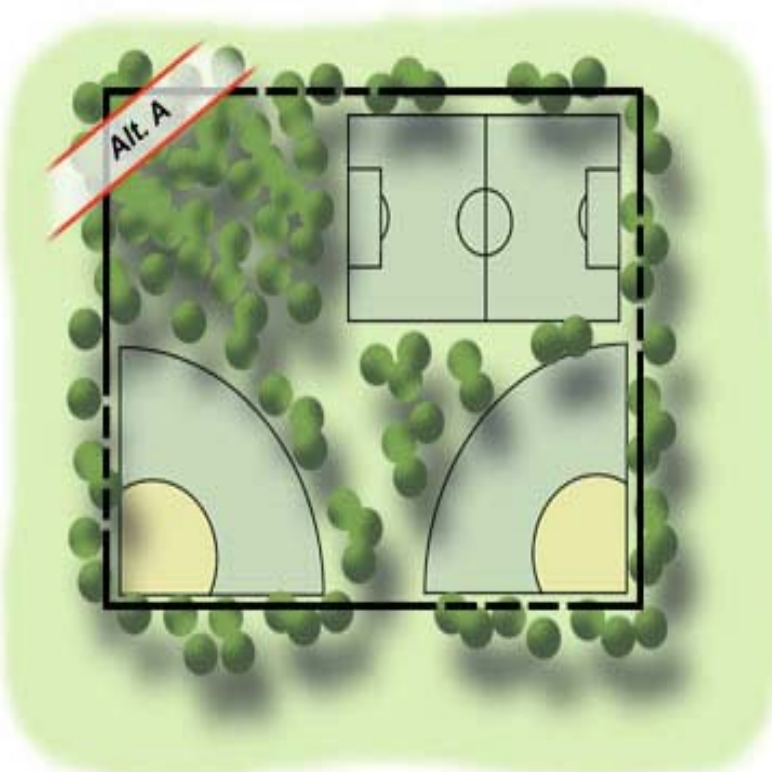
This alternative successfully avoids all Section 4(f) resources, but, as a result, impacts a forest and a wetland. Avoiding one resource will often result in impacting another, thus the balancing act of comparing different resources in developing a feasible and prudent avoidance alternative. Coordination with DOT and interested agencies (such as wetland regulatory agencies) is necessary to determine whether this alternative can be considered feasible and prudent.



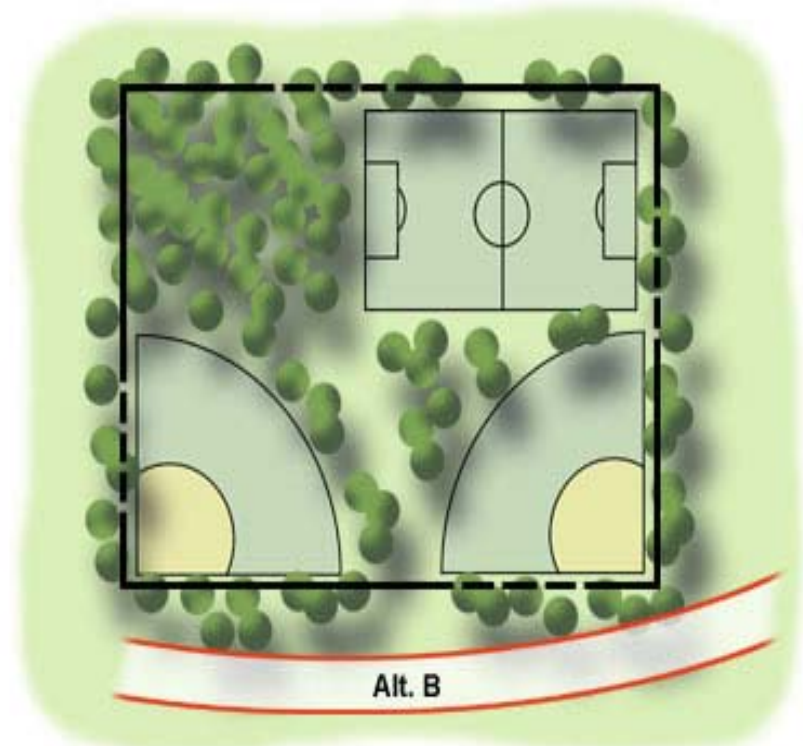
Consider the Net Impact

- ❖ Quality of the resource
- ❖ Size of use
- ❖ Location of use
- ❖ Severity use
- ❖ Function of portion used
- ❖ Remaining function of property after use

Alternative Analysis/Selection

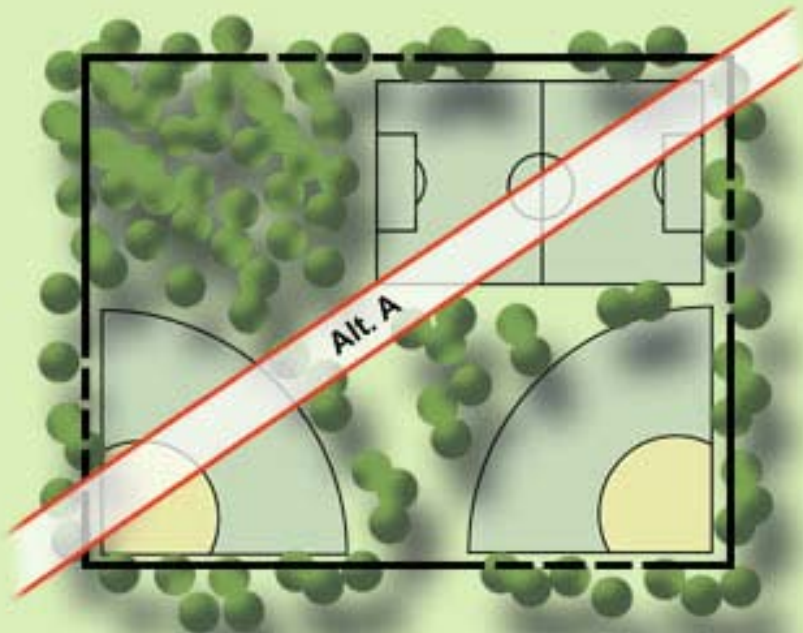


Even though Alternative A does not impact any recreational elements, it is still considered a minimization alternative. Avoidance alternatives cannot impact any portion of the Section 4(f) resource.

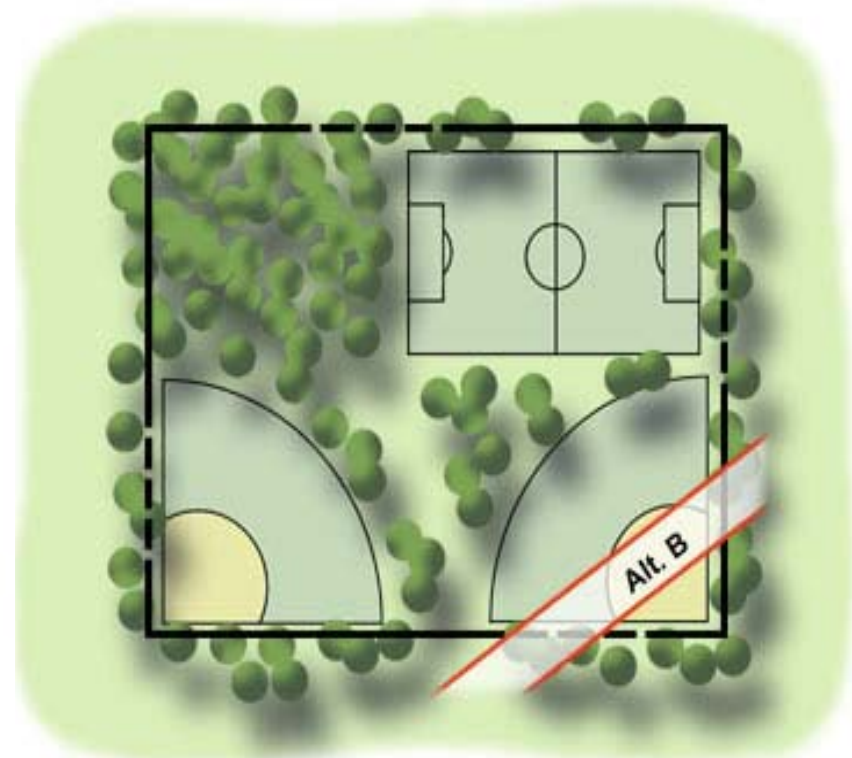


Alternative B completely avoids the park and, therefore, may be considered an avoidance alternative. Impacts to additional resources, other than Section 4(f), must be considered in order to determine if the avoidance alternative is prudent.

Alternative Selection

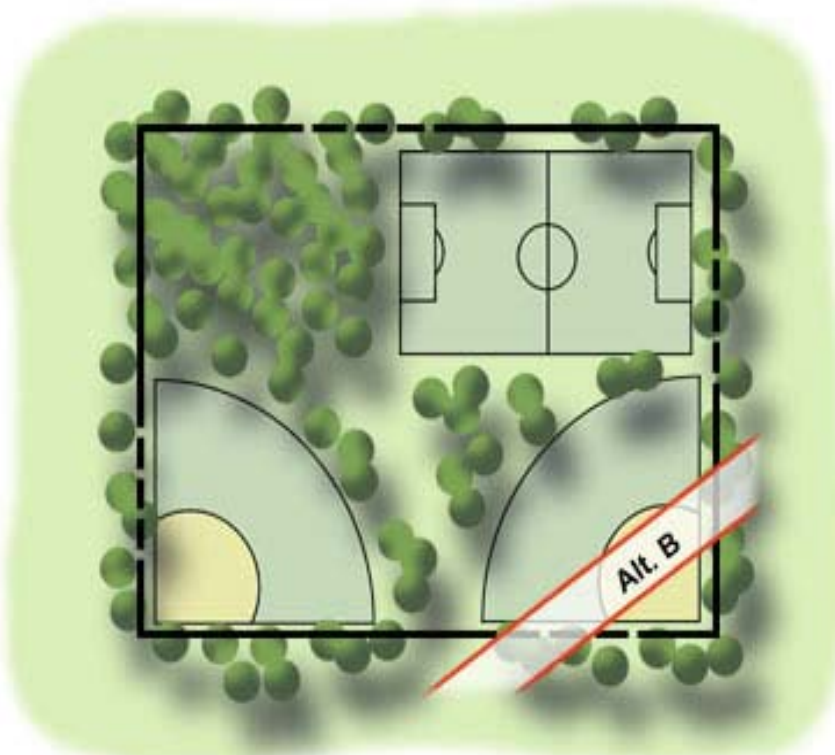


Alternative A traverses two recreational elements and a large section of the resource.

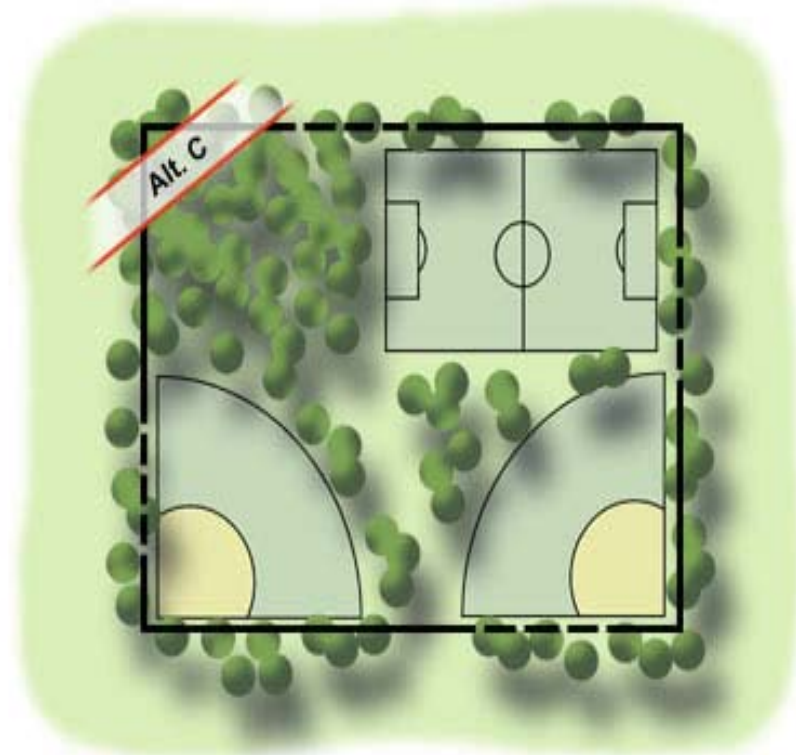


Alternative B traverses a smaller section of the park, but still impacts one of the recreational elements.

Alternative Selection



Alternative B traverses a smaller section of the park, but still impacts one of the recreational elements.



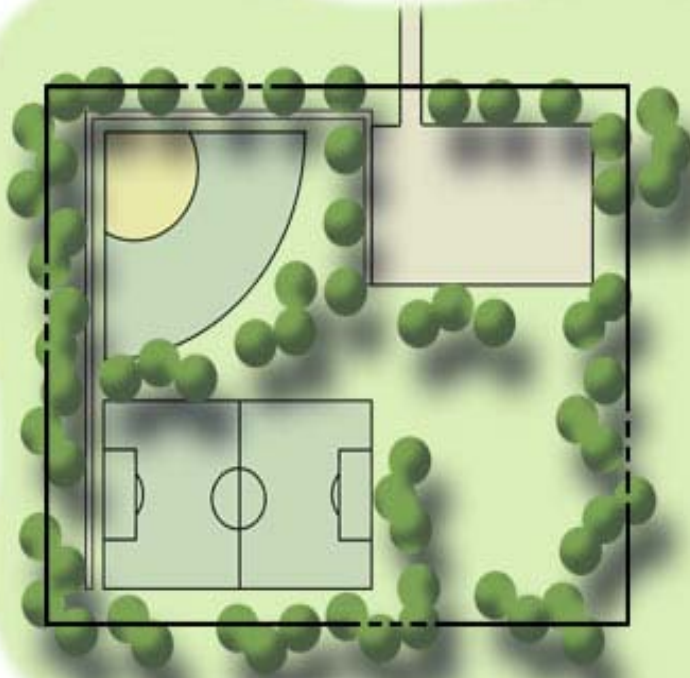
Alternative C extends through a smaller portion of the park and does not impact recreational elements. Based on this scenario, if there are no avoidance alternatives, Alternative C should be selected.



Rules to Alternative Selection

- ❖ If a feasible and prudent avoidance alternative is available
 - Stop there, you must select it
- ❖ If there are no feasible and prudent avoidance alternatives (all alternatives result in a use)
 - You must select the alternative that has the least harm to the 4(f) resource

Potential Mitigation

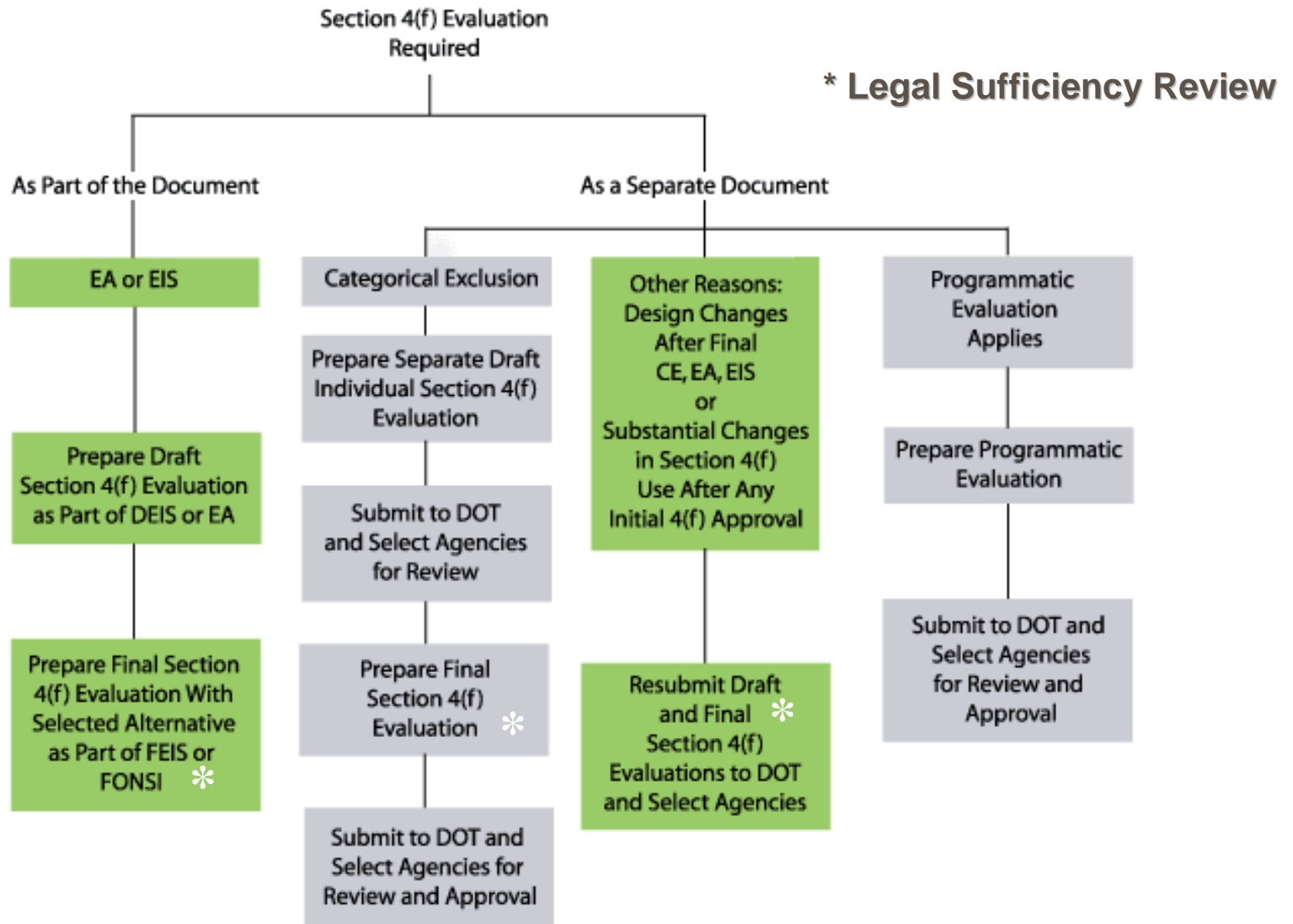


Potential Mitigation Measures



Restoration/mitigation measures in this example include a vegetated buffer and relocated sidewalk along the new roadway, a relocated ballfield and replacement lands. In this example, other recreational elements, such as a gym set, have been added. Part of the mitigation process can involve recreational elements requested by the owner of the park that were not part of the original park setting.

Evaluation Flowchart





Programmatic 4(f) Evaluations

- ❖ No exemptions of basic 4(f) requirements
- ❖ Optional, not required
- ❖ Documentation vs. document
- ❖ No DOI coordination or legal sufficiency
- ❖ Time savings
- ❖ Flexible procedures
- ❖ Generally minor 4(f) use
- ❖ Agreement with official with jurisdiction is essential



Programmatic 4(f) Evaluations

- ❖ Minor involvement with public parks, recreation areas, and wildlife and waterfowl refuges
- ❖ Minor involvement with historic sites
- ❖ Use of historic bridges
- ❖ Independent bikeway or walkway construction projects (1977 negative declaration)
- ❖ Net benefit to Section 4(f) Property (2005)



Parts of a Programmatic

- ❖ Applicability
- ❖ Alternatives
- ❖ Coordination
- ❖ Measures to minimize harm
- ❖ Findings
- ❖ Approval procedure



General Applicability

- ❖ Improvement is on essentially the same alignment
- ❖ 4(f) resource is adjacent to existing highway
- ❖ Use of lands or proximity impacts do not impair the use of the remaining land
- ❖ Limit on property taken (parks,...)
- ❖ Official(s) with jurisdiction must agree with assessment of impacts and mitigation measures

There are specific criteria for each programmatic



Applicability Continued

- ❖ Federal agency with an interest in the land does not object to land conversion or transfer
- ❖ Project does not remove or alter historic buildings, structures, or objects, or remove or disturb archeological resources that are important to preserve in place
- ❖ Section 106 determination of no adverse effect
- ❖ Generally does not apply to EIS projects



Programmatic Analysis

- ❖ Evaluate avoidance alternatives
 - Do nothing
 - Improve existing without using 4(f) land
 - Building on new location
- ❖ Coordination
 - Federal agencies with encumbrances
 - USCG coordination if a bridge permit is required



Programmatic Analysis

- ❖ Measures to minimize harm
 - Written agreement from Officials with jurisdiction
 - Based on agreement with the SHPO/THPO (and ACHP, if needed) via the Section 106 Process
- ❖ Findings
 - Information on alternatives and measures to minimize harm must support the specific findings of the programmatic evaluation



Approval / Documentation

- ❖ Once the FHWA Division Administrator or designee ...
... finds that all of the criteria, procedures, etc. of the applicable programmatic have been satisfied
- ❖ Degree of documentation depends on State DOT and FHWA Division Office



For Further Assistance

For project-specific questions please start with your Region Environmental Office (or your Highways and Local Programs Area Engineer if you are a City or County) and your FHWA Area Engineer.

Steve Yach
WSDOT ESO NEPA Specialist
509-324-6132
YachS@wsdot.wa.gov

Sharon Love
Environmental Program Manager
FHWA Washington Division
360-753-9558
Sharon.Love@fhwa.dot.gov